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No. 01-432

IN THE

# Supreme Court of the United States

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CONSOLIDATED FREIGHTWAYS, INC.,
*Petitioner,*

v.

LLOYD W. CRAMER, *et al.*
*Respondents.*

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CONSOLIDATED FREIGHTWAYS CORPORATION, *et al.*
*Petitioners,*

v.

GUILLERMO ALFARO, *et al.*
*Respondents.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## REPLY BRIEF FOR PETITIONERS

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## REPLY BRIEF FOR PETITIONERS

Respondents do not deny the importance of this case. This Court has long recognized that "[i]f the policies that animate § 301 are to be given their proper range," *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202, 210 (1985), all state law claims that "depend[] upon the meaning of a collective-bargaining agreement" for their resolution must be pre-

empted. *Lingle* v. *Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 406 (1988). The en banc Ninth Circuit held that a court may "look to" a CBA "to determine whether a plaintiff's claim necessarily implicates its terms without 'interpreting' the agreement." Pet. App. 16a. That holding—which represents the court's attempt to "clarif[y] and correct[]" the Ninth Circuit's prior "approach to § 301 preemption," Pet. App. 6a, 13a—threatens to erode this Court's § 301 jurisprudence and undermine the federal policies this Court has endeavored to promote. The court's holding is binding on all federal courts in the nine states the Ninth Circuit comprises and establishes the analytical framework to be applied in every § 301 preemption case. It will thus affect the interpretation of innumerable CBAs.[1]

The en banc Ninth Circuit's holding therefore warrants this Court's review. Indeed, respondents make little attempt to argue otherwise, focusing instead on the Ninth Circuit's *alternative* holding. Their arguments notwithstanding, that holding—which "threatens the ability of * * * parties to negotiate legitimate expectations of privacy," Pet. App. 23a—provides an equally compelling basis for review.

1. a. Respondents altogether ignore the multiple conflicts created by the en banc Ninth Circuit's principal holding. As we explained, that holding directly conflicts with this Court's precedents holding that § 301 preempts any state law claim that "depends upon the meaning of a collective-bargaining agreement" for its resolution. *Lingle*, 486 U.S. at 406. *See* Pet. 12-17. In particular, the decision below conflicts with *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. at 214-215, and *International Brotherhood of Electrical Workers* v. *Hechler*, 481 U.S. 851, 861-862 (1987), in which this Court held that

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[1] Indeed, the Ninth Circuit has already applied the decision below in another case. *See Sprewell* v. *Golden State Warriors*, 266 F.3d 979, 990-992 (2001).

tort claims were preempted because reference to the CBA at issue was required to determine whether it created an *implied* duty or obligation. Indeed, as we noted, the fact that the CBA here expressly contemplates the use of video surveillance—which respondents do not deny—makes this an even stronger case for preemption than either *Allis-Chalmers* or *Hechler*. *See* Pet. 14-16. Respondents, however, do not offer any response.

b. We also explained how the Ninth Circuit's holding conflicts with this Court's precedents recognizing that CBAs "may include implied, as well as express, terms." *Consolidated Rail Corp.* v. *Railway Labor Execs.' Ass'n*, 491 U.S. 299, 311 (1989). *See* Pet. 17-18. Although the en banc Ninth Circuit essentially repudiated this line of authority, *see* Pet. App. 13a-15a, respondents again have nothing to say.

c. Except to note that other decisions apparently did not involve allegations of criminal conduct, respondents fail to address the conflicts between the en banc Ninth Circuit's principal holding and the decisions of numerous other federal circuits that have faithfully adhered to this Court's precedents and held that § 301 preempts claims involving " 'condition[s]' of employment," such as workplace privacy. *In re Amoco Petroleum Additives Co.*, 964 F.2d 706, 710 (7th Cir. 1992). *See* Pet. 18-22.[2] As the dissent below recognized, "Consolidated's argument [in favor of preemption] is *much stronger* than arguments other courts have accepted for the purposes of finding preemption" in other cases, Pet. App. 29a (emphasis added), including the Seventh Circuit in *In re Amoco Petroleum Additives Co.*, *supra*, where the court held that workplace privacy claims were preempted even though the CBA at issue contained "not one word" about surveillance. 964 F.2d at 709. The irreconcilable conflict between

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[2] As we explain below, respondents' attempt to distinguish these cases on the basis of alleged criminal conduct is unavailing.

the Seventh Circuit's decision in *Amoco* and the decision below alone merits this Court's review.

d. Instead of confronting these undeniable conflicts, respondents attempt to defend the en banc Ninth Circuit's principal holding by arguing that a "clear and unmistakable" waiver of their privacy rights was required and that "even a cursory look at the [CBA] shows that it is silent on the subject of placement of cameras." Opp. 17. *See id.* at 17-20. But that attempt cannot save the en banc Ninth Circuit's erroneous decision. Even if a "clear and unmistakable" waiver were necessary, whether there has been such a waiver would still require reference to, and interpretation of, the CBA because it expressly deals with the subject of video surveillance. In any event, the Ninth Circuit's holding was not based on the absence of a "clear and unmistakable" waiver, so the need for review remains. *See* Pet. 16a, 18a.

2. Respondents spend most of their efforts attempting to persuade this Court to deny certiorari because—in their view—the challenged surveillance violated § 653n of the California Penal Code.[3] Their arguments, however, are mere red herrings that should be rejected. To begin with, the Ninth Circuit did not rely on § 653n in holding that it "need not 'interpret' the CBA to see that it does not contemplate the surreptitious videotaping plaintiffs challenge in their state law claim." Pet. App. 18a. Thus, respondents' arguments in this respect do not respond at all to the need for review of the en banc court's principal holding.

Moreover, respondents' reliance on § 653n to establish their claims does not remove their claims from the preemptive scope of § 301. Respondents have brought civil claims for invasion of privacy. As we explained—and respondents

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[3] The authorities who investigated the conduct in this case and declined to press charges apparently took a contrary view. *See* Pet. 6.

do not contend otherwise—to prevail on those civil claims respondents must show " 'a reasonable expectation of privacy on [their] part.' " Pet. App. 30a n.6 (quoting *Hill* v. *NCAA*, 865 P.2d 633, 655 (Cal. 1994)). If respondents consented to the challenged surveillance through their union in the CBA, that " 'obviously affect[ed] [their] expectations' " of privacy. Pet. App. 33a (quoting *Hill*, 865 P.2d at 655).[4]

That is true regardless of whether the challenged surveillance in fact violated § 653n or whether § 653n confers a " 'nonnegotiable state-law right[]' " to be "free[] from the illegality [of two-way mirror surveillance]." Pet. App. 19a (quoting *Allis-Chalmers*, 471 U.S. at 213).[5] The en banc Ninth's Circuit's contrary conclusion—that a person consenting to such surveillance nevertheless has a reasonable expectation of privacy as a matter of law—cannot withstand scrutiny. As Judge O'Scannlain explained in his dissent, to establish a "reasonable expectation on [his] part," a plaintiff

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[4] Respondents do not dispute that their union was authorized to consent on their behalf. Nor do they dispute that the CBA provides them with the traditional remedy of arbitration.

[5] We note again that such propositions are highly questionable at best. *See* Pet. 24 & n.15. As Judge O'Scannlain observed in his dissent, "it is far from clear whether Consolidated's videotaping violated § 653n," as the California Supreme Court has indicated that the statute would appear to prohibit only " 'clandestine, *unexpected*' viewing." Pet. App. 31a n.7 (quoting *In re Deborah C.*, 635 P.2d 446, 452 (Cal. 1981)) (emphasis added by dissent). Thus, "one of the modes of 'observation' from which § 653n does not make [respondents] 'immune' is an 'expected' viewing from behind a two-way mirror." *Id.* "Such a viewing would be 'expected' if [respondents] consented to it in the CBA." *Id.* Any other interpretation "would allow the State to prosecute criminally someone who erects a two-way mirror at the invitation of the person he is videotaping." *Id.* Thus, even assuming, as respondents contend (Opp. 19), that in California criminal statutes cannot be waived—a broad proposition for which the cases cited by respondents do *not* stand—§ 653n simply cannot be read to prohibit consensual viewing.

must demonstrate both that he had a "subjective" expectation of privacy and that his expectation was reasonable. *See* Pet. App. 30a & n.6. And as he further pointed out, "there simply is no decision of the California Supreme Court which holds as a matter of law that one has a *subjective* expectation of privacy from illegal intrusions to which one has consented." Pet. App. 32a (emphasis added). Indeed, as he put it, it is "doubt[ful] that there will ever be such a holding of the California Supreme Court" because it would "lead to the ridiculous situation in which I could *invite* someone to videotape me behind a two-way mirror, only to then turn around and sue that person for violating my right to 'privacy.' " *Id.* (emphasis in original).

In short, respondents' privacy claims turn on whether respondents had a "reasonable expectation of privacy on their part" in the restrooms at the Mira Loma terminal. That depends on whether they consented, through their union, to the challenged workplace surveillance. And whether they consented to that surveillance "depends upon the meaning" of the CBA. *Lingle*, 486 U.S. at 406. As the dissent below recognized and the initial panel concluded, Section 653n does not change any of this.[6]

3. a. Once this much is clear, respondents' arguments fall by the wayside. For instance, respondents argue that their claims are not preempted because "parties to a collective bargaining agreement cannot agree to allow conduct that is illegal under state law." Opp. 8. *See id.* at 7-9. But this case is not about whether the CBA's video surveillance provisions

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[6] Although respondents "principally rely," Pet. App. 51a n.9—and in reaching its alternative holding the en banc Ninth Circuit exclusively relied—upon § 653n, respondents also contend that that the challenged surveillance violated other provisions of the California Penal Code. *See* Pet. 9 n.6. As the initial panel concluded in its decision, those provisions also "hinge[] on the absence of consent," Pet. App. 52a n.9, so they likewise have no effect on the preemption of respondents' claims.

are enforceable. As discussed, this case is about whether respondents can prove they had a "reasonable expectation of privacy on their part" in the restrooms at the Mira Loma terminal and prevail on their claims for damages. If respondents consented to the challenged surveillance through their union in the CBA, that " 'obviously affect[ed] [their] expectations.' " Pet. App. 33a (quoting *Hill*, 865 P.2d at 655).

b. Respondents also argue that there is no need to interpret the CBA because "California's courts have held that the state's constitution and criminal law provides users of a restroom with a reasonable expectation of privacy *as a matter of law*." Opp. 11 (emphasis in original). As discussed, however, an invasion of privacy claim also requires a "subjective" expectation of privacy. And as Judge O'Scannlain observed in his dissent, even if the expectation of privacy in a restroom is "reasonable" as a matter of California law, that "does not establish * * * whether [respondents] had a *subjective* expectation of privacy in the restroom." Pet. App. 32a.[7]

c. Finally, respondents argue that their claims are "independent" of the CBA because they can be resolved without reference to the CBA. *See* Opp. 13-17. As the foregoing makes clear, that contention is simply without merit.[8]

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[7] Indeed, even cases on which respondents rely (Opp. 11-12) stand only for the proposition that one has a reasonable expectation of privacy from observation to which one has not consented. *See, e.g., People* v. *Metcalf*, 98 Cal. Rptr. 925, 927 (Ct. App. 1971) (holding that § 653n "enunciates a public policy against *clandestine* observation of public restrooms and renders it reasonable for users thereof to expect that their privacy will not be *surreptitiously* violated") (emphases added). *See also* Pet. App. 31a n.7 (noting that *People* v. *Triggs*, 506 P.2d 232 (Cal. 1973), has been clarified by the California Supreme Court to "extend[] only to 'clandestine, *unexpected*' viewing") (quoting *In re Deborah C.*, 635 P.2d at 452) (emphasis added by dissent).

[8] Seeking to avoid this conclusion, respondents mischaracterize this case as one involving a "*defense*" that "might involve interpretation of the

4. a. Respondents fare no better when it comes to the conflicts created by the Ninth Circuit's alternative holding. Indeed, although we explained how that holding contravenes this Court's rulings that even state law claims conferring "non-negotiable state-law rights" are preempted *unless* they are sufficiently independent of the CBA (Pet. 23-25), respondents do not address this fundamental conflict.[9]

b. Attempting to deny the circuit conflict created by the en banc Ninth Circuit's alternative holding, respondents argue that the decision below is "entirely consistent" with a number of decisions of other federal circuits holding that various claims were not preempted by § 301. Opp. 20. *See id.* at 20-23 & n.6. *None* of the cases cited by respondents, however, involved workplace privacy claims. Moreover, each of those decisions dealt with claims that—unlike respondents' privacy claims here—were clearly outside the scope of a CBA. The claims held not preempted were either those involving assault, battery, or other conduct not "an ordinary subject of bargaining," *Amoco*, 964 F.2d at 710, *see e.g.*, *Peterson* v. *BMI Refractories*, 132 F.3d 1405, 1413 (11th Cir. 1998); *Anderson* v. *Ford Motor Co.*, 803 F.2d 953, 958-959 (8th Cir. 1986), *cert. denied*, 483 U.S. 1011 (1987), or those brought for wrongful discharge or discrimination under state laws that did not require reference to a CBA for

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[CBA]." Opp. 16 (emphasis in original). That attempt fails because whether respondents had "a reasonable expectation of privacy on [their] part"—which cannot be determined without reference to the CBA—is clearly one of the *elements* of a privacy claim which respondents must prove to prevail. *Hill*, 865 P.2d at 655.

[9] That conflict provides a compelling basis for review, particularly as it generates uncertainty concerning the enforcement of nationwide CBAs—like the one in this case—which commonly deal with issues of workplace privacy. *See* Pet. 27-30. Under the Ninth Circuit's approach, unions and employers would have to search laws state by state before agreeing to a CBA.

their application. *See, e.g.*, *Kohl's Food Stores, Inc.* v. *Hyland*, 32 F.3d 1075, 1078 (7th Cir. 1994); *Knafel* v. *Pepsi Cola Bottlers of Akron, Inc.*, 899 F.2d 1473, 1482 (6th Cir. 1990). In any event, to the extent any of the decisions cited by respondents is in fact "entirely consistent" with the decision below, as respondents assert, that would only deepen the circuit conflict and thus heighten the need for this Court's review.[10]

c. Respondents also purport to take Consolidated to task for asserting that other federal circuits have "uniformly" held that § 301 preempts workplace privacy claims. Opp. 23 (quoting Pet. 25). Respondents' reproof is based on two cases in which courts held that privacy claims were not preempted. *See* Opp. 23-24. Neither of those cases, however, involved *workplace* privacy claims.

In *Schmidt* v. *Ameritech Corp*, 115 F.3d 501 (7th Cir. 1997), for instance, an employee brought an invasion of privacy claim against his employer for monitoring his telephone calls while he was on a leave of absence. In holding that his claim was not preempted, the court noted that the employee "[was] not making any claim about surveillance of his workplace telephone [or] his workplace environment," but rather a claim that he "had the same right to protection for his customer information as all other [of his employer's] customers." *Id.* at 504, 505. Similarly, in *Keehr* v. *Consolidated Freightways of Delaware, Inc.*, 825 F.2d 133 (7th Cir. 1987), an employee brought an invasion of privacy claim based on a supervisor's rude comments about his wife. That claim obviously had nothing to do with an invasion of

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[10] Respondents contend that each of those decisions "adopted a rule that lawsuits arising out of prohibited activity by an employer are not preempted." Opp. 22. Not one of those decisions, however, held that a claim was preempted merely because the conduct involved was allegedly unlawful.

"workplace" privacy. Thus, in stark contrast to this case, in these two cases there was clearly no need to interpret the CBA to resolve the plaintiffs' claims.

d. Finally, respondents attempt to distinguish the workplace privacy decisions with which the en banc Ninth Circuit's alternative holding conflicts on the ground that they apparently did not involve allegations of criminal conduct. *See* Opp. 24-26. For the reasons discussed above, respondents' reliance on § 653n to distinguish these cases is simply misplaced.[11]

* * *

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted, and the judgment reversed.

Respectfully submitted,

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[11] Even if these cases were somehow distinguishable, the Ninth Circuit's alternative holding would still conflict with decisions holding that claims based on conduct that might have been criminal were nevertheless preempted by § 301. *See* Pet. 26 (discussing cases).